WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
May 2005

This calendar contains cases that originated in the following counties:
Brown
Dane
Eau Claire
Lafayette
Milwaukee
Outagamie
Sheboygan
Trempealeau
Walworth

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

TUESDAY, APRIL 26, 2005

9:45 a.m.	03-2249	John R. Ammerman v. Paddy A. Hauden
10:45 a.m.	03-0988	Matthew Ferdon, et al v. Wisconsin Patients Compensation Fund, et al
1:30 p.m.	02-2817	James Cape & Sons Co. v. Terrence D. Mulcahy, et al

WEDNESDAY, APRIL 27, 2005

9:45 a.m.	04-0770-CR	State v. Eric W. Raye
10:45 a.m.	03-2255	State v. Lisimba L. Love
1:30 p.m.	03-2820-CR	State v. Henry W. Aufderhaar

THURSDAY, APRIL 28, 2005

9:45 a.m.	03-0979-FT	Gary J. Howell v. Orrin Denomie, et al
10:45 a.m.	03-1444-CR	State v. Christopher Anson
1:30 p.m.	03-1376	Shannon Preston, et al v. Meriter Hospital, Inc., et al

FRIDAY, APRIL 29, 2005

9:45 a.m.	03-1067	Elaine Marie Kohn, et al v. Darlington Community Schools, et al
10:45 a.m.	03-2306	State v. Thomas H. Bush
1:30 p.m.	04-0901	Sheboygan County DSS v. Matthew S.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 26, 2005
9:45 a.m.

03-2249 John R. Ammerman, et al v. Paddy A. Hauden, et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed in part and reversed in part a judgment of the Dane County Circuit Court, Judge Stuart A. Schwartz presiding.

This case involves a failed real estate transaction. The questions before the Supreme Court are whether the circuit court properly awarded default judgment against the plaintiff, an investment partnership, when the partnership's attorneys did not appear for trial even though two of the three partners appeared; whether the circuit court properly awarded the defendants damages based upon loss-of-bargain (a legal term meaning the inability to complete a sale or other business deal because of another's breach of contract, intentional interference, negligence or some other wrongdoing); and whether the defendants were entitled to be paid interest that accrued before the judgment was issued.

Here is the background: In 1995, Paddy Hauden and Susan Scholl (the defendants) sought to purchase a property on Normandy Lane in Madison from ROI Investments (the plaintiffs), a partnership comprised of John R. Ammerman, Robert L. Klein, and, later on, Brian G. Sumption. They offered $1.6 million with the contingency that the current tenant would stay. ROI could not guarantee that, so Hauden and Scholl offered to drop the contingency in exchange for a better price – $1.3 million. ROI rejected the offer, and the property was sold at a sheriff's sale to a bank. Hauden and Scholl then offered to purchase the property from the bank, but ROI filed for bankruptcy, stopping that sale. The defendants re-submitted their $1.3 million offer to ROI. On the day when the two sides were to obtain the necessary approval of the bankruptcy court, a $1.4 million offer came in from RJK Partnership, which consisted of Klein (one of the ROI partners) and his father. With the larger offer on the table, the bankruptcy court declined to approve the $1.3 million offer from Hauden and Scholl. A few days later, RJK withdrew its offer. Hauden and Scholl dropped their effort to purchase the property and it was soon sold to someone else.

Four years later, ROI sued Hauden and Scholl, alleging that they had breached their initial offer to purchase. Hauden and Scholl responded by pointing out that the offer had been made with a contingency (the existing tenant's lease extension) that the sellers could not meet. Hauden and Scholl further responded with a counterclaim alleging that ROI had conspired with RJK to scuttle the second $1.3 million offer.

A trial on the ROI claim and on the counterclaim by Hauden and Scholl was scheduled for early 2002, but on the day of the trial, there was no attorney present to represent ROI (several attorneys had represented ROI at various points in the proceedings and all had been granted permission to withdraw because they had not been paid). Although two of the partners – Klein and Sumption – were present, they were not prepared to argue the case. The judge granted default judgment against ROI (dismissing the ROI claim and granting the Hauden/Scholl counterclaim). The trial court awarded damages of $200,000 to Hauden and Scholl. The $200,000 figure is the difference between $1.5 million (the market value of the property, as listed in the bankruptcy filing) and $1.3 million (the price that Hauden and Scholl would have paid had the deal not been scuttled). The trial court also awarded Hauden and Scholl $104,000 in pre- and post-judgment interest and costs.

ROI appealed, and the Court of Appeals affirmed the trial court on most of the issues but reversed its determination that ROI should have to pay approximately $70,000 in pre-judgment interest on the $200,000 award.

The Supreme Court will clarify when pre-judgment interest may be assessed, and will clarify

whether default judgment was appropriate given that two of the ROI partners were present in court.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 26, 2005
10:45 a.m.

03-0988 Matthew Ferdon, et al v. Wisconsin Patients Compensation Fund, et al

This is a review of a decision of the Wisconsin Court of Appeals, District III, which affirmed a judgment of the Brown County Circuit Court, Judge Peter Naze presiding.

This case involves a boy who was injured at birth as a result of medical malpractice and who is now challenging the state law that caps non-economic damages (damages for injuries that are difficult to quantify such as pain, suffering, and loss of companionship, as opposed to economic losses, which are awarded to compensate a person for such items as lost wages, medical bills, and damage to property).

The $350,000 cap on awards of non-economic damages in medical malpractice cases was set in Wis. Stats. § 655.017 and 893.55(4) and went into effect on May 25, 1995. The law requires that the Director of State Courts to adjust the cap for inflation; it currently stands at about $433,000.

Here is the background: Matthew Ferdon, who is now 8, has a deformed and partially paralyzed right arm caused by an injury he suffered at birth. Court filings indicate that Michael J. Brockman, M.D., pulled on Matthew's head during the birth and caused a condition called obstetric brachial plexus palsy.

The Ferdon family sued, and in December 2002, a Brown County jury found Brockman negligent and awarded Matthew $403,000 in future medical and hospital expenses and $700,000 in past and future non-economic damages. The trial court reduced the non-economic damages to comply with the cap and ordered all but $100,000 of the amount awarded for medical/hospital expenses be paid into a medical expense fund, as Wis. Stat. § 655.017 requires. The family appealed, and the Court of Appeals summarily affirmed the trial court.

In the Supreme Court, Matthew argues that the cap on non-economic damages in medical malpractice cases violated his constitutional rights by denying him the right to a jury trial and to equal protection under the law, and violated the separation of powers doctrine by substituting the judgment of the Legislature for that of the jury. The defendants, however, point out that statutes are presumed to be constitutional and that the role of the courts is to interpret and apply the law – not to weigh the wisdom or rationale behind it. The courts may declare an act of the Legislature unconstitutional only if it is proven beyond a reasonable doubt that the Legislature abused its discretion in enacting the law.

The Supreme Court heard a similar case challenging this law in April 2000, but the Court – with Justice David Prosser Jr. not participating – was equally divided on whether to affirm or reverse a Milwaukee County Circuit Court order that found the statute unconstitutional. Having arrived at a tie, the Supreme Court sent the case down to the Court of Appeals (which the case had bypassed originally) for a decision. The Court of Appeals upheld the cap.

This case gives the Supreme Court a new opportunity to determine whether the cap on non-economic damages in medical malpractice cases is constitutional.

WISCONSIN SUPREME COURT

TUESDAY, APRIL 26, 2005
1:30 p.m.

02-2817 James Cape & Sons Co. v. Terrence D. Mulcahy, et al

This is the second time the Wisconsin Supreme Court has heard oral argument in this case. The first oral argument, in April 2004, raised issues that the Court determined would require additional briefing. With the additional paperwork on file, the Court now will re-hear the case. This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a summary judgment of the Dane County Circuit Court, Judge Moria Krueger presiding.

In this case, the Wisconsin Supreme Court will clarify what is to happen when a company that bids on a public project discovers, after the bids are opened, that there is a mistake in its bid.

Here is the background: James Cape & Sons Co. bid on a highway interchange project in Milwaukee. As is the custom, the Cape team and other bidders brought groups to Madison the night before the bids were due and set up mini-offices at a local hotel. Cape's team included eight people with computers, printers, and telephones. They worked through the night receiving proposals from prospective subcontractors, accepting or rejecting them, and making numerous calculations and recalculations. In the morning, one hour before the bids were due, Cape received word from one of its low-bid subcontractors, Zenith Tech, that it had made an error. Zenith provided the correct figure – which was about $450,000 higher than its original number – but Cape mistakenly submitted the bid with the initial, wrong number.

The bids were submitted, each with a $100,000 bid bond. When the bids were opened, Cape was the low bidder. It soon discovered that it had submitted the wrong bid and notified the state of the error. The options available to the state, under the statutes, are:

- Let the bidder amend the bid.
- Let the bidder withdraw the bid and refund the $100,000.
- Hold the bidder to the low price or force them to forfeit the $100,000.

The state decided to allow Cape to withdraw, but kept the $100,000 bid bond. Cape went to court, arguing that this was not one of the options permissible under the statute. The circuit court agreed, ordering the state to return the money. In reaching its decision, the court focused on a line in the statute that says the bidder may correct the bid or withdraw and receive a refund if the mistake was clearly not caused by any carelessness "in examining the plans or specifications."

The state appealed, and the Court of Appeals affirmed, but noted that government entities and contractors would benefit from a clarification of the circumstances under which contractors are entitled to correct their bid errors.

While all have agreed that the mistake did not arise from examining the plans or specifications, the state argues that the error was not, in fact, free from carelessness/negligence/inexcusable neglect. The Supreme Court will decide whether Cape's money was properly refunded, and will clarify when a bidder must pay the price for a wrong bid.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 27, 2005
9:45 a.m.

04-0770-CR State v. Eric W. Raye

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a judgment of the Outagamie County Circuit Court, Judge Dennis C. Luebke presiding.

This case involves a man who was convicted of operating a motor vehicle with a prohibited alcohol content as a third offense by a jury that included one juror who initially disagreed with the guilty verdict. The question before the Supreme Court is whether the judge erred in questioning, and permitting the lawyers to question, the juror individually before returning him to the jury room and ordering further deliberation.

Here is the background: Eric W. Raye was charged with operating a motor vehicle while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC), both as third offenses. A jury trial was held. Because these offenses are criminal, the jury verdict needed to be unanimous. The jury returned verdicts of guilty on the PAC and not guilty on the OWI. Raye then asked the judge to poll the jury. One of the jurors responded to the question, "Is this your verdict?" by asking whether he could ask a question. The judge directed him to first respond to the poll question, and the juror did so – answering "no." The other 11 jurors agreed to the verdict.

The judge sent the other 11 jurors out of the room so that he and the lawyers could hear the juror's question. During this proceeding, the juror explained his "no" answer to the verdict question:

> I wasn't sure. I didn't know that they were going to be individual polling. I was going to ask this question ahead of time. When we did the initial polling, myself I had a question about one of the answers, and that was one of the stumbling blocks, if he was guilty or not guilty, and finally in the end, I had changed my vote to what was decided….

Having heard the juror express that he initially had supported the jury's verdict, the court asked the juror additional questions to determine which way he wanted to vote. The juror said he was not 100 percent sure that he agreed with the verdict. The court then determined that it would have to reject the jury's verdict, ascertained that the juror's question centered on the testimony of one of the State's witnesses, and ordered that a transcript of that testimony be prepared. With that transcript in hand, the jury resumed deliberations and ultimately returned the same verdict – but this time without dissent.

Raye then filed a motion seeking to vacate the sentence or, alternatively, seeking a new trial. The court denied the motion and Raye appealed, arguing that the trial court had erred in conducting the interrogation of the dissenting juror and pointing out that the law requires only that the judge send the jury back to deliberate when a juror dissents from the verdict.

The Court of Appeals affirmed the verdict, concluding that the interrogation was warranted because Raye's dissent had not been made clear by his response ("Can I ask a question?") to the jury poll. The appeals court also noted that the judge took care at the beginning of the interrogation to explain to the juror that he should not feel any pressure to change his verdict and that he was free to vote his conscience.

Now Raye has come to the Supreme Court, where he argues that the interrogation put undue pressure on the juror to conform to the verdict, subjected him to the wrath of the 11 waiting jurors, and allowed the rest of the jury to deliberate in his absence. The Supreme Court will determine whether Raye will receive a new trial.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 27, 2005
10:45 a.m.

03-2255 State v. Lisimba L. Love

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a conviction in the Milwaukee County Circuit Court, Judge John A. Franke presiding.

This case involves a man who claims to have been wrongfully convicted of armed robbery. The Supreme Court will take a new look at the conviction.

Here is the background: On Sept. 28, 1999, a man was robbed at gunpoint outside of a Milwaukee sports bar. Based in part upon information from a woman who claimed to have witnessed the robbery from a nearby car, and who told police she thought she recognized Lisimba L. Love (her former neighbor) at the scene, Love was arrested along with another man. Love pleaded not guilty and a four-day jury trial was held in January 2000. Love was convicted and sentenced to 44 years in prison as a habitual criminal. His co-defendant was acquitted. Love appealed and the Court of Appeals affirmed his conviction.

In May 2003, Love filed a motion for a new trial, based upon three issues. First, Love argued that his attorney had been ineffective because the attorney failed to pursue evidence that might have exonerated Love. Specifically, Love claimed that his mother had received a call soon after the crime and before the jury trial from a man named Jerees Veasley who allegedly told her, "They got the wrong man," and "I know who did it." Love asserts that his attorney failed to interview Veasley, who, Love believes, could have provided valuable testimony at his trial. The second issue Love raises is that the attorney who represented him in his initial effort to win a new trial also was ineffective because that attorney did not raise the "ineffective trial counsel" argument. And finally, Love presents an affidavit from a fellow inmate claiming that a third inmate, Floyd Lindell Smith Jr., confessed to having committed the armed robbery.

The May 2003 motion was unsuccessful. The trial court found no evidence that Love's trial counsel had failed to pursue the alleged phone call and concluded that his other "newly discovered" evidence was actually not new. The Court of Appeals affirmed.

Now, Love will try to convince the Supreme Court that the issues he raises merit a new trial.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 27, 2005
1:30 p.m.

03-2820-CR State v. Henry W. Aufderhaar

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Walworth County Circuit Court, Judge Robert J. Kennedy presiding.

This case involves a 502-day delay between the filing of a juvenile delinquency petition and the filing of a petition to waive the juvenile into adult court. The Supreme Court is expected to decide if this lengthy delay means the case must be dismissed.

Here is the background: In June 2001, Henry Aufderhaar was 15 and living with his parents in Jefferson when a police officer interviewed him about five alleged incidents of second-degree sexual assault of a child and two alleged incidents of fourth-degree sexual assault of a child. Several weeks after the interview, Aufderhaar and his family moved to Montana.

On Aug. 21, 2001, Jefferson County filed a delinquency petition against Aufderhaar but the file was transferred to Walworth County (where the assaults were alleged to have occurred) after it was learned that the family no longer lived in Jefferson. In early October, attempts were made to mail documents containing information about the pending charges to Aufderhaar in Montana but they were returned as "attempted – not known." Then, a delinquency petition was filed in Walworth County with a return date of Nov. 8, 2001. Aufderhaar did not appear for this hearing and an order was put out to bring him in. For the next year and a half, the case lay dormant.

On March 6, 2003, Walworth County was advised by authorities in Montana that Aufderhaar had been involved in a juvenile matter related to "sexual behavior." This information was forwarded to the district attorney, who filed a petition in the still-pending juvenile matter to waive Aufderhaar into adult court. The paperwork was sent to Aufderhaar's new address in Montana and was not returned. At an April 23, 2003, hearing, the Walworth County Circuit Court agreed to waive Aufderhaar into adult court. A criminal complaint was filed and a warrant was issued for his arrest.

On Oct. 2, 2003, more than two years after the delinquency petition was initially filed, Aufderhaar appeared in Walworth County Circuit Court. He challenged the waiver into adult court, arguing that the paperwork had not been properly served on him and that the juvenile court had no authority to approve the waiver in his absence. He also alleged that the 502-day delay between the filing of the petition and the filing of the waiver was unreasonable and prejudicial. The court rejected these claims, finding that Aufderhaar had absconded to Montana with his family to avoid prosecution and that any attempt to serve court papers on him would have been ineffectual because he was hiding. The court found that it still had jurisdiction over the case and that the matter would proceed. Aufderhaar asked for permission to appeal this ruling before the case moved forward, and that permission was granted.

The Court of Appeals affirmed the trial court's ruling although it expressed concern that the Walworth County District Attorney's Office had not pursued efforts to serve the court papers on Aufderhaar and noted that Aufderhaar could have been found and that the state "simply sat on its hands and did nothing."

Now, Aufderhaar, who will turn 20 this summer, has come to the Supreme Court, where he argues that the delay violated his rights and that the State should not be permitted to prosecute him as an adult. The Supreme Court will decide if the criminal prosecution against Aufderhaar will move forward.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 28, 2005
9:45 a.m.

03-0979-FT Gary J. Howell v. Orrin Denomie, et al

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a judgment of the Trempealeau County Circuit Court, Judge John A. Damon presiding.

In this case the court is expected to address the question of what constitutes a "frivolous appeal" under Wisconsin Statute 809.25 (3), and the procedures the court must use to make such a determination. The case began as a disagreement about the terms of the sale of a home and ended with a judgment against the petitioners, Orrin and Helen Denomie, for about $10,000 in damages, penalties, and attorney fees and costs as punishment for having filed a frivolous appeal.

Wisconsin law defines a frivolous appeal as one that has no hope of success or one that is filed simply to harass the opposing party. When an appeal is found to be frivolous, the appellant may be ordered to pay the other side's court costs and fees, as well as attorney fees.

Here is the background: Orrin and Helen Denomie are an older couple who were friends of Gary J. Howell's father. Gary Howell wanted to a buy a home but did not have the money to do so. The Denomies agreed to help him purchase the home, but the parties have very different recollections about the terms of that agreement. The Denomies maintain they offered to purchase the home for Howell and that Howell agreed to rent the home from them until he could come up with the money to buy it from them. They intended to purchase the home for $67,000 and sell it to Howell for the same amount. Howell, however, maintains that the Denomies agreed to lend him the $67,000 so that he could buy the home and he would then give them and note and a mortgage and make monthly payments to them on that loan. There was a meeting at a local bank, where the Denomies maintain they thought they were closing on the house, but where they were actually taking out a loan for $67,000, at 7.5 percent interest.

Howell made regular monthly payments to the Denomies, which the couple reported as rent on their income tax returns. When Howell obtained his own bank loan, he attempted to pay the Denomies back – minus the total amount he had paid them in monthly installments. The Denomies would not agree, asserting that the monthly payments were rent and that he still owed them the entire price of the home. Howell filed suit against the Denomies. The Denomies filed an answer and a counterclaim. The trial court concluded that Howell's final, lump-sum payment to the Denomies satisfied the mortgage and that he owed them nothing more. The judge also made the ruling that sparked this appeal. He found that the Denomies answer to Howell's lawsuit, and their counterclaim against Howell, were frivolous, and ordered them to pay Howell's attorney fees along with penalties. The Denomies appealed, and the Court of Appeals affirmed the trial court but also concluded that the *appeal* itself was frivolous – and awarded Howell additional attorney fees and penalties.

Now the Denomies have come to the Supreme Court, where they argue that they should not have been penalized simply for pursuing what they believed to be a legitimate claim, and further that they should have been given an opportunity to be heard on the issue of whether their claim was frivolous before the trial court imposed the sanctions on them.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 28, 2005
10:45 a.m.

03-1444-CR State v. Christopher Anson

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a judgment of the Walworth County Circuit Court, Judge James L. Carlson presiding.

This case involves a man who was convicted of sexual assault in the fondling of a teenage girl and then had his conviction reversed on appeal. The question before the Supreme Court is whether the analysis that the Court of Appeals employed to invalidate the conviction was proper.

Here is the background: On May 1, 1997, Christopher Anson, then 30, allegedly fondled his then 14-year-old niece. In 2000, he was charged with three counts of sexual assault, acquitted on two of the counts and convicted on the third. He appealed the conviction and the Court of Appeals concluded that the police interrogation, which occurred at Anson's workplace in Orange County, Calif., and which produced some statements that ultimately were incriminating, violated Anson's Sixth Amendment right to counsel.

The Court of Appeals sent the case back to the trial court, directing the trial court to determine if there was a link between the statements to police and Anson's decision to testify at trial. This type of analysis is called a "waiver analysis" and is conducted according to the Harrison/Middleton rule, which is derived from two court decisions. If it is determined that a defendant felt compelled to testify in order to overcome damage done by statements to police or other evidence that should have been suppressed, then the defendant's testimony is just as tainted as the illegal evidence and also must be suppressed. But if, on the other hand, the defendant would have testified anyway, and if he would have said the same things in his testimony, then the testimony need not be suppressed.

In this case, the trial court concluded that the illegal police interrogation was *not* the reason Anson took the stand. The judge noted that Anson's attorney recommended that Anson testify, that Anson had an interest in explaining his defense that the activity was consensual, that he had an interest in making the point that he had no prior criminal record, and finally that many family members on both sides were in the courtroom and that Anson had a reason to want to face them. Having determined that Anson would have testified even if his statements to police had been suppressed, the trial court concluded that Anson would not receive a new trial.

Anson again appealed, arguing that the trial court had failed to follow the Court of Appeals' directions and that the State had failed to prove that its use of the inadmissible statements did not force Anson to testify. The Court of Appeals agreed, finding that the waiver analysis had been improperly conducted and that Anson had, in fact, been compelled to take the stand in order to overcome the illegally obtained confession. The Court of Appeals reversed Anson's conviction.

Now the State has come to the Supreme Court seeking review of the Court of Appeals holding. The State argues that the Court of Appeals decision, if allowed to stand, fundamentally changes the type of inquiry required under the Harrison/Middleton rule, and might violate a defendant's right not to incriminate himself and his right to counsel. The Supreme Court is expected to clarify the procedure for assessing whether a defendant's court testimony was voluntary.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 28, 2005
1:30 p.m.

03-1376 Shannon Preston, et al v. Meriter Hospital, Inc., et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a summary judgment of the Dane County Circuit Court, Judge Stuart A. Schwartz.

The case involves the birth of a premature baby and the mother's lawsuit against the hospital for not resuscitating the infant. The question before the Supreme Court is whether a law that requires hospitals to screen and stabilize people who come to the emergency room applies to infants born after emergency labor in hospital birthing wards.

Here is the background: On Nov. 10, 1999, Shannon Preston gave birth to a son, Bridon. Bridon was premature, born at 23 weeks, 2 days. He weighed 1½ pounds and measured 13 inches. An ultrasound examination performed prior to Bridon's birth showed that his lungs were not sufficiently developed and that he would be unable to survive without resuscitation and long-term intensive care. Meriter Hospital withheld treatment for the baby and he died 2 ½ hours after birth.

Preston sued the hospital for negligence and neglect of a patient, arguing that the hospital's decision not to stabilize Bridon violated the Emergency Medical Treatment and Active Labor Act (EMTALA), which Congress enacted in 1986 and which requires hospitals to (1) provide appropriate medical screening to determine whether the situation is an emergency, and (2) provide treatment to stabilize a patient with an emergency need before discharging or transferring the patient. This law was enacted to prevent patient 'dumping' – transferring patients based upon their ability to pay rather than on their medical needs.

The circuit court granted summary judgment in favor of Meriter Hospital, dismissing Preston's claims after concluding that EMTALA only requires a hospital to stabilize a patient who is going to be transferred. The Court of Appeals affirmed the circuit court's judgment, although the appeals court construed Preston's claim as accusing the hospital of violating the screening requirement of EMTALA, rather than the stabilization requirement. The Court of Appeals concluded that the screening requirement applies only to patient in the emergency ward, not to patients who have been admitted to the birthing ward.

Now, Preston has brought her case to the Supreme Court, arguing that the lower courts misconstrued the requirements of EMTALA. In paperwork filed with the Court, she argues:

> [I]t is absurd to construe EMTALA to permit hospitals to avoid EMTALA liability for failing to treat or screen patients by simply 'admitting' them without any intention of treating them. Under such a preposterous rule, hospitals could simply 'admit' patients in emergency medical conditions, then let them die in a corner of the emergency rooms with no intention of screening, treating, or transferring them, yet thereby escape EMTALA liability.

The Supreme Court will determine if the EMTALA requirements of screening and stabilization apply to infants born after emergency labor in hospital birthing wards.

WISCONSIN SUPREME COURT
FRIDAY, APRIL 29, 2005
9:45 a.m.

03-1067 Elaine Marie Kohn, et al v. Darlington Community Schools, et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a summary judgment of the Lafayette County Circuit Court, Reserve Judge Daniel L. LaRocque presiding.

This case involves a child who was injured when she fell through a set of bleachers on a high school football field. The Supreme Court is expected to decide whether the deadline for filing a lawsuit has expired – a determination that will require, in turn, a clarification of whether bleachers meet the legal definition of "improvements to real property."

Here is the background: On Sept. 29, 2000, Elaine M. Kohn and her mother, Lori, were attending a Darlington Redbirds homecoming football game at Darlington High School. They sat on aluminum bleachers that were fabricated and installed in August 1969 by Standard Steel Industries, Inc., which has since merged with other companies and currently is Illinois Tool Works Inc. (ITW). At about 2:30 in the afternoon, Elaine, who was 4 ½ at the time, fell through the bleachers and suffered a serious head injury.

The Kohns sued the school district, the district's insurer, and ITW on Aug. 15, 2001, claiming that the school had breached its duty of care to them. The defendants filed a counterclaim alleging that Lori had been negligent in her supervision of her daughter. The trial court concluded that the bleachers were an improvement to real property, which meant that a statute imposing a 10-year limitation period applied. Because Elaine was injured almost 31 years after the bleachers were installed, the court dismissed the case.

The Kohns appealed, and the Court of Appeals found in their favor, concluding that the bleachers were not, in fact, an improvement to real property. The Court of Appeals determined that the deadlines imposed in personal injury cases apply in this case, meaning that the Kohns' lawsuit was filed timely.

Now, the school district, its insurer, and ITW have come to the Supreme Court where they argue that the bleachers are, in fact, a permanent addition to the school grounds – in other words, an improvement to the real property. They point out that the bleachers cost more than $16,000 to install in 1969, have never since been disassembled or moved, and are anchored into asphalt. The Kohns, on the other hand, maintain that the Court of Appeals correctly determined that the bleachers rest on top of the ground, do not alter the landscape, did not require excavation to install, and can be taken down with no major effect on the land.

The Supreme Court will decide if bleachers qualify as "improvements to real property," which will in turn determine whether the Kohns may continue their lawsuit against the district and the manufacturer.

WISCONSIN SUPREME COURT
FRIDAY, APRIL 29, 2005
10:45 a.m.

03-2306 State v. Thomas H. Bush

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an order of the Eau Claire County Circuit Court, Judge William M. Gabler presiding.

This case involves a man who has been committed to a mental hospital as a sexually violent person under the so-called "sexual predator" law, Wis. Stat. Ch. 980. The question for the Supreme Court is whether a person who is thus committed may raise constitutional issues in a sequence of appeals, or whether this is barred by a case called Escalona-Naranjo.

The Wisconsin Supreme Court in Escalona-Naranjo said that a prisoner who is challenging his sentence must wrap all of his claims together, rather than filing a series of motions raising different issues. If the prisoner is aware of an issue and does not raise it, he forfeits the right to do so except in instances where he has demonstrated a sufficient reason for waiting. The question here is whether that rule also applies to people who are not prisoners but are under civil commitment.

Here is the background: Thomas H. Bush has an extensive criminal history going back 35 years and has been convicted of multiple sexual offenses. In 1988, he was convicted of entering a nursing home and trying to sexually assault an elderly patient. He was released from prison on that offense in 1992 and permitted to leave the state to enroll in a sex offender program in Georgia. While there, he was charged with drunk driving. Although he was acquitted on that charge, he was returned to Wisconsin where his parole was revoked and he was sent back to prison.

In 1997, with Bush approaching his release date, the State filed a petition seeking to have him committed as a sexually violent person. A jury agreed and the trial court ordered him committed. He appealed, and the Court of Appeals reversed that order after concluding that the jury had been erroneously instructed. The case was sent back to the trial court and, in 2000, another jury concluded that Bush was a sexually violent person. The Court of Appeals affirmed this finding.

In 2002, Bush filed a petition for release and filed motions challenging the constitutionality of Ch. 980. He argued that the law violated his constitutional rights of due process and equal protection because it failed to require a finding that there was no alternative available to him that was less restrictive than a locked mental hospital, and because it failed to require proof of a recent overt act. Bush lost on all counts; the judge denied his motions and a jury concluded that he remained a sexually violent person.

Bush appealed, and the Court of Appeals affirmed all of the decisions and concluded that Bush had forfeited his right to attack the constitutionality of the statute underlying his initial commitment by not raising these issues in his two prior appeals. The Court of Appeals acknowledged that Ch. 980 commitments are civil, not criminal, and so Bush was not considered a prisoner for purposes of Escalona-Naranjo; however, the court noted that Escalona-Naranjo has been extended in the past to cases involving appeals of probation and parole revocations, which also are civil proceedings.

The Supreme Court will determine whether the principles of Escalona-Naranjo, which encourages finality in litigation by discouraging prisoners from strategically separating their issues on appeal into multiple cases, apply to appeals of Ch. 980 commitments.

WISCONSIN SUPREME COURT
FRIDAY, APRIL 29, 2005
1:30 p.m.

04-0901 Sheboygan County DSS v. Matthew S.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed an order of the Sheboygan County Circuit Court, Reserve Judge Thomas S. Williams presiding.

This case involves the termination of a mother's parental rights to her son. The trial court in this case violated a mandatory deadline set out in the Wisconsin Statutes for handling termination proceedings. The issue before the Supreme Court is whether, by not challenging the missed deadline in the circuit court, the mother gave up her right to raise the issue on appeal.

Here is the background: Joshua was born on Oct. 10, 2001, to Rachel. When Joshua was about six weeks old, a circuit court found him to be a child in need of protection and/or services and he was removed from Rachel's home and placed in foster care. Joshua's father, Matthew, was soon to begin serving a 10-year prison sentence for having abused Joshua's half brother. In March 2003, a social worker petitioned to have the rights of Matthew and Rachel terminated on grounds that Joshua continued to need protection and services that the parents were not providing.

In October 2003, after a jury found that neither parent would be able to meet conditions for Joshua's return within a 12-month period, the Sheboygan County Circuit Court terminated the rights of Rachel and Matthew to Joshua, who was then 2.

Both Matthew and Rachel appealed on several grounds. Matthew claimed that his lawyer was ineffective for not seeking to have Joshua placed with Matthew's parents during his incarceration, and that the Sheboygan County Department of Social Services (DSS) had not done enough to help him comply with the conditions for Joshua's return. The Court of Appeals affirmed the trial court's termination of Matthew's parental rights and his appeal ended.

The Court of Appeals also affirmed the termination of Rachel's parental rights, but one of the issues she raised on appeal sparked this current case. She claimed that the court missed a deadline and that this error should undo the termination proceeding. Her claim was based upon the fact that she entered a plea denying the grounds for the termination on March 27, 2003, and the law requires a fact-finding hearing within 45 days of such a plea. The court originally set the hearing to commence within this timeframe, but postponements requested by both parents and by the DSS delayed Matthew's hearing until September 17 and Rachel's until October 15.

The Court of Appeals determined that Rachel had waived the right to challenge the postponement by not raising the issue in the circuit court. In reaching this conclusion, the appeals court relied upon a 2004 opinion in which the Wisconsin Supreme Court held that the ability to challenge a court's competency to hear a case is waived if not raised in the circuit court. While that opinion did not address challenges such as this one that are based upon mandatory time limits established in the statutes, the Court of Appeals concluded that the language of the opinion was sufficiently broad as to mandate a general "use it or lose it" result.

The Supreme Court will clarify whether Rachel waived her right to challenge the violation of the statutory deadline by not having raised it in the circuit court.